

COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF TELECOMMUNICATION AND ENERGY

)  
Investigation by the Department of Telecommunications )  
and Energy into whether (1) metering, meter maintenance )  
and testing, customer billing, and information services ) D.T.E. 00-41  
should be unbundled; and (2) the service territories of )  
distribution companies should remain exclusive. )  
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REPLY COMMENTS OF GOULSTON & STORRS ON BEHALF OF CERTAIN  
LARGE-SCALE REAL ESTATE DEVELOPERS

Introduction

These reply comments are submitted on behalf of certain developers of large scale real estate projects in connection with the public comments submitted in response to the Department's inquiry in D.T.E. 00-41. We submitted initial comments suggesting that the Department propose legislation that addresses issues related to the provision of distribution service in undeveloped areas. Here, we reply to comments submitted in response to Questions 3 and 4 of D.T.E. 00-41, related to the exclusivity of distribution companies' service territories, which may impact our initial comments. These reply comments are intended to address only those issues concerning the exclusivity of service territories and the provision of the Electric Restructuring Act of 1997 (the "Act") granting to distribution companies the power to consent to the entry of other distribution companies into their service territories, and should not be construed to assert a position with respect to the exclusivity of service territories in areas actually served as of July 1, 1997.

Summary of Initial Comments

In our initial comments, we suggested that the Department propose amendments to the Act to (1) allow for the entry of alternate distribution companies into undeveloped areas, and (2) to repeal the provision of the Act granting distribution companies the power to determine whether or not other companies may provide distribution service in their defined service territories. We stated that the Act did not appear to address instances involving large undeveloped areas that are not currently served by a distribution company, and that allowing for competition among providers in such areas would lead to greater efficiency which would benefit consumers. We also observed that the unilateral power of distribution companies to grant consent to enter their service territories could lead to anti-competitive decision-making and, in some cases, could conflict with the municipal consent power.

Reply Comments

1. An Exception Addressing Undeveloped Areas is Warranted Because the Act Did Not Address the Delineation of Service Territories in Areas not "Actually Served" as of

July 1, 1997

We note that the majority of comments submitted approve of the Act's mandate that the Department define service territories for distribution companies, and we do not object to this in principle. However, the Act required that the delineation of service territories be based on areas "actually served" as of July 1, 1997, and therefore did not address undeveloped areas in a meaningful way. While an effort could be made to assign to companies previously unserved areas, such service territories would be the product of administrative action, and not in accordance with the "natural" development of franchise rights that several commenting electric companies have claimed has resulted in the current distribution of service territories.

Even in areas in which a distribution company has actually provided service, there may not be a clearly established franchise right to provide service in that area. There is no legal authority which clearly establishes that any company has the monopoly right to provide distribution service in any particular area. See D.P.U. Inquiry into Electric Industry Restructuring, D.P.U. 95-30, Appendix B(III); Ecological Fibers, D.P.U. 85-71 (1986). In D.P.U. 95-30, p. B.5, the Department cited a number of cases that suggest that franchises are not exclusive. Further, even in areas where a distribution company may allegedly have developed a "natural" franchise, exceptions to such franchise may have also arisen naturally. For instance, in Petition of William Foley, D.P.U. 85-71 (1986), the Department ordered the Wellesley Board of Public Works (the "Board") to provide electric distribution service to two new houses in an area of Needham where the Board had previously extended service and could do so cheaply, and where provision of distribution service by Boston Edison Company ("BECO"), the electric company traditionally serving most of Needham, would have resulted in significant expenditures by BECO.

In view of the foregoing, an exception for undeveloped areas where no actual distribution service has ever been provided, and where no company can claim a "natural" franchise right, is appropriate in the context of delineating service territories under the Act.

## 2. Competition for Service to Large Developments in Undeveloped Areas Does Not Preclude Delineation of Service Territories in Areas Actually Served

The exclusivity of service territories in areas actually served is not incompatible with an exception for undeveloped areas. A case that commenters have cited for the proposition that distribution company service territories are exclusive also supports the proposition that an alternate division of service territories in undeveloped areas is appropriate and in keeping with the statutory scheme. See *Weld v. Gas & Electric Com'rs v. Edison Electric Illuminating Co. of Boston*, 197 Mass. 556, (1908). In *Weld*, where two electric companies divided up an undeveloped area between themselves to provide distribution service, the court found that there would be no concern with respect to duplication of plant or interference with existing lines. *Id.* at 558.

## 3. Competition in Undeveloped Areas Promotes Economic Efficiency

Competition for the build-out of distribution systems in large undeveloped areas would result in lower costs which should ultimately benefit consumers in the form of lower rates. Courts and the Department have recognized the potential efficiencies generated from such competition. See *Weld*, 197 Mass. 556; *Ecological Fibers, Inc.*, D.P.U. 85-71; *Petition of William Foley*, D.P.U. 86-45/86-144. In *Foley*, the Department noted that BECO would have had to expend \$80,000 to \$300,000 to connect lines to the two houses to be developed, while the Board already had lines directly

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in front of the subject properties. Foley, p. 10. If a regulatory system were in place which required BECo to serve such area, this inefficiency would have been administratively required.

The question of efficiency becomes all the more important in the case of large-scale developments, where the dollar amounts involved are much greater than in individual cases. Competition for the opportunity to develop the electric distribution infrastructure in undeveloped areas which results in a reduced cost for a large-scale project could generate substantial savings benefiting many consumers of electricity.

#### 4. Sunk Cost Concerns Are Not Relevant To Competition for Distribution Service in Undeveloped Areas

The concern that one of the commenters raised regarding the inability of distribution companies to recover sunk costs when there is competition for borderline customers is not present in the case of large, undeveloped areas. An undeveloped area would not be an area in which a distribution company has previously made an investment in anticipation of expansion or increased usage which would justify cost recovery, because the provision of distribution service to an area previously lacking electric distribution infrastructure is not a service obligation of distribution companies. See Commonwealth Electric Co., D.P.U. 93-41, p. 17 (1993) (Department found there was no net loss to the electric company when a customer expands into another service territory in which it could obtain lower rates). Indeed, when new development occurs in such previously undeveloped areas, it is the developer, rather than the electric company, that funds the extension of service into the area, so there is no utility sunk cost related to such infrastructure investment.

#### 5. Consumer Protection Concerns Raised by the Commenters Do Not Apply in the Case of Development of Distribution Service Infrastructure in Undeveloped Areas

Several commenters expressed concern that the failure to delineate service territories leads to ambiguity about which company is obligated to serve consumers in particular areas. For example, prior to the Act, a distribution company could refuse to provide service in a given area where it had no clear right to provide service. In the case of undeveloped areas, however, this is not a concern.

Developers will only commit to a large development, and residents and business customers will reside there, only if a distribution company has committed to service the area. The completion of the development will require a commitment to provide distribution service to customers in the development, and the relevant distribution company would be regulated and therefore subject to all applicable state regulatory requirements (including obligations with respect to default service, nondiscrimination, etc.).

#### 6. The Relevant Municipality or the Department, not Private Companies, are the Appropriate Bodies to Make Decisions Regarding Service Territories

As we noted in our initial comments, the Act inappropriately delegates regulatory authority to private companies in granting to distribution companies the power to consent to other companies to provide distribution service within their administratively defined service territories. We previously observed that this regulatory scheme generates the potential for conflict with municipalities in their determinations regarding service territories. In this regard, the Act as currently worded inappropriately redistributes regulatory authority from municipalities to private companies. Such authority has been delegated by statute to municipalities for many years, pursuant to M.G.L. c. 164, §§ 87 and 88, and is a key element of the current state of development of service territories in the Commonwealth.

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Further, the resolution of service territory disputes such as that in Foley, D.P.U. 86-45/86-144, i.e., where the result of a claimed (or delineated) service territory leads to inefficiencies in the provision of distribution service, is exactly the type of function which is appropriate for a governmental regulatory body. The Department, not a private party, should be in the position to resolve such disputes with efficiency concerns and consumer interests, and not private interests, in mind. To assume, as one commenter does, that such disputes would cease to arise following the delineation of service territories is simply unrealistic. Under the current legislation, when such disputes arise, many of them will be in the hands of private parties to resolve, and not subject to adjudicatory review by the Department, where such regulatory function properly lies.

The danger here is that private parties will make self-interested, potentially anti-competitive, or economically inefficient, decisions. We do not take a position on whether the scope of such potential inefficiencies or potential anti-competitive behavior would be outweighed by a potential reduction in the number of service territory disputes. However, we believe that in the case of large developments in undeveloped areas, the economic effect of such decisions would be significant, having market impact, as opposed to decisions in borderline disputes that may affect only one or several customers. It seems inappropriate to delegate such decisions, which are regulatory in nature, to private parties.

Conclusion

In replying to the comments addressing exclusivity of service territories, we reiterate that an exception for undeveloped areas is warranted, to allow for competition for the build-out of the new distribution infrastructure required to service such areas. We believe that this approach is in harmony with the Act, which only addressed areas "actually served," and that an exception for undeveloped areas would otherwise be compatible with the Department's delineation of service territories. Further, competition for the build-out of the electric distribution infrastructure in undeveloped areas could potentially generate substantial savings, without adversely impacting important consumer protection concerns. Finally, we continue to assert that the provision of the Act giving distribution companies the power to determine whether or not to grant consent to the entry of other distribution companies into their service territories constitutes an improper delegation of regulatory authority to private parties, which carries potentially damaging consequences.

Respectfully Submitted,

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